No. 829

Supreme Court of the United States

October Term 1970

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM 1940

No. 826

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ALICE GRAY KALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 45-53) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940 and the Govern-

ment's Petition for Rehearing was denied on December 10, 1940. The Petition for Certiorari was filed in this Court on March 8, 1941, but a copy of the Petition and Record was not received by Respondent's counsel until March 21, 1941. Petitioner invokes jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The Petition for Certiorari asks the Court to review a decision of the Circuit Court of Appeals for the Sixth Circuit denying the United States Motion to Dismiss and remanding the case to the District Court for further proceedings. No final judgment has been entered.

Taxpayer brought suit against the United States on July 7, 1936, to recover $195,710.44[1] of 1919 income taxes overpaid to Collector John A. Grogan in 1920, by reason of having computed on her 1919 income tax return, the profit on the sale of certain Ford Motor Company stock upon the basis of a March 1, 1913 value of only $9,480.34. This value had been determined in advance of the sale by Commissioner Roper. The correct March 1, 1913 value as determined by the Board of Tax Appeals was $10,000 per share (R. 13). The delay in starting suit is accounted

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(1) It is true as suggested on page 7 of the Petition for Certiorari, that the statutory interest is now equal to, or in excess of, this principal amount. However, any interest refunded would be taxable in the year of receipt. The combined normal, surtax, and defense tax rates on $200,000 of a married person's net income totals 56.1% at the present time. *Vol. 1, 1941 Standard Fed. Tax Service*, p. 804. The percentage would be higher in the event Mrs. Kales had additional net income.

for by the length of time that the taxpayer's claim for refund was under consideration by the Bureau of Internal Revenue.

Nearly five years after taxpayer's 1919 income tax return was filed, the then Commissioner of Internal Revenue fixed a new March 1, 1913 value on the Ford Motor Company stock of $2,634 per share and made a jeopardy assessment without notice or hearing in the amount of $2,627,309.95. This tax was paid under protest to the then Collector, Fred L. Woodworth, on March 24, 1925 (R. 14). Suit was brought to recover it, resulting in a judgment for taxpayer. At the same time that the jeopardy assessment was levied against the taxpayer, deficiencies approximating $31,000,000 were assessed against certain other Ford stockholders who brought action before the Board of Tax Appeals, which thereafter, on May 5, 1928, determined that the correct March 1, 1913 value of the Ford Motor Company stock was $10,000 per share, instead of $9,489.34 (See *James Couzens* 11 B.T.A. 1040, 1044). The Government took no appeal from this decision. The $195,719.44 for which the present suit is brought is the overpayment by taxpayer resulting from the computation on this valuation of $10,000 as compared with that of $9,489.34 on which the taxpayer paid the tax.

Taxpayer's protest upon payment of the jeopardy assessment to Collector Fred L. Woodworth was in the form of a letter dated March 23, 1925 (R. 19-24), a duplicate copy of which was mailed to the Commissioner of Internal Revenue on March 24, 1925. The present controversy centers around paragraphs 9 and 10 of this letter which dealt, not with the jeopardy assessment being simultaneously paid to Collector Woodworth, but

with the taxes paid nearly five years prior thereto to Collector Grogan (R. 23, 24). The taxpayer claims and the court below concluded, that these paragraphs constituted a sufficient informal claim for refund.

Thereafter, on September 24, 1928, and prior to any action having been taken thereon by the Commissioner (R. 15), taxpayer filed a formal amendment to this claim (R. 26), specifying the March 1, 1913 value of $10,000 per share as fixed and determined by the United States Board of Tax Appeals in the *James Couzens* case, *supra*, and stating the amount of income taxes overpaid by her in 1920 to Collector Grogan to be $195,710.44, as above.

The disposition of taxpayer's informal claim of March 23, 1925, and the formal amendments thereto made on September 24, 1928, was held under advisement by the Commissioner of Internal Revenue until June 4, 1935. In the interim, a hearing was held under date of June 13, 1929, on the merits of the claim before the General Counsel for the Bureau of Internal Revenue. At this hearing, the General Counsel advised taxpayer's attorneys that he was satisfied that the letter of March 23, 1925 was sufficient to constitute an informal claim for refund, and that it was filed within the statutory period (R. 42). No exceptions were ever taken to the statements in taxpayer's Supplemental Brief confirming counsel's understanding of the General Counsel's admission (R. 42). Four years later taxpayer's attorneys were informed that the delay in acting on her claim was due to the fact that the Bureau was considering claims of taxpayer's brothers (R. 43).

No formal rejection of taxpayer's claim for refund was ever made, but under date of June 4, 1935, taxpayer received a letter (Exhibit "I" of Amended Petition,

R. 34) from the Commissioner of Internal Revenue, wherein the position was taken that the payment of the judgment for $2,627,309.05, which taxpayer had recovered against Collector Woodworth, precluded the Bureau from giving further consideration in any respect to the matter of her income tax liability for the taxable year 1919. There was nothing in this letter to indicate that the Commissioner repudiated the position taken by the General Counsel six years prior thereto that the letter of March 23, 1925 constituted a sufficient informal claim for refund. On June 18, 1935 taxpayer's attorney conferred with a member of the staff of the General Counsel's office with respect to the Commissioner's letter of June 4, 1935, and said member expressed surprise at the form of the letter and its contents and stated that he had previously recommended to the General Counsel that taxpayer's claim for refund be allowed (R. 43).

Thereafter, taxpayer wrote to the Commissioner under date of August 5, 1935 (R. 35), stating that she construed the Commissioner's letter of June 4, 1935 to be a disallowance of her claim for refund. This information was of importance to taxpayer so that she might know when the statute of limitations on starting suit would commence to run. Taxpayer's final communication from the Commissioner prior to starting the suit at bar was the Commissioner's letter of August 20, 1935 (R. 37), and in this letter the Commissioner took the position that taxpayer had filed suit upon the claim filed in 1925, and, after obtaining judgment for the full amount claimed, attempted in September, 1928, to "amend the claim for refund, which gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year". He concluded

that the refund claim filed in 1925 was merged into the judgment secured against the United States and that taxpayer was precluded from filing an amendment to the earlier claim which had been finally adjudicated.

The Commissioner clearly was acting under a mistake of fact. After filing taxpayer's letter of March 23, 1925, taxpayer on June 4, 1925 filed a separate claim for refund for the $2,627,309.05 paid to Collector Woodworth, and this was the claim that was reduced to a judgment against the Collector (and not against the United States as stated by the Commissioner in his letter of August 20, 1935). The Commissioner did not assert in his letter of August 20, 1935, that taxpayer's letter of March 23, 1925 did not constitute a claim for refund, nor did he repudiate the position taken on this point by the General Counsel years before.

Taxpayer started suit on July 7, 1936, but was required to amend her Petition by the District Court's order of October 19, 1936 (R. 10) granting the Government's motion to strike a portion of the original Petition. The United States then moved to dismiss the Amended Petition on alternative grounds (R. 38); and as one of the grounds, asserted for the first time that taxpayer's letter of March 23, 1925 "neither constitutes nor includes a claim for refund". In the alternative, it was asserted that even if the letter constituted a claim for refund, it had been rejected by the Commissioner's letter of April 6, 1925 (R. 25). As a second alternative, it was asserted that if the March 23, 1925 letter were to be construed as constituting a claim for refund, this claim became extinguished since it was merged with the judgment rendered against Collector Woodworth.

The disposition of the Motion to Dismiss was held under advisement by the District Court for over two years and an order of dismissal was finally entered February 27, 1939. In the appeal to the Sixth Circuit, the only issues raised by the United States were whether taxpayer's letter of March 23, 1925 constituted an informal claim for refund, and if so, whether it had been rejected by the Commissioner's letter of April 6, 1925. The United States did not press its argument that the claim in question had been merged with and became extinguished by the judgment against Collector Woodworth. As stated by the Circuit Court of Appeals in the last paragraph of its opinion (R. 66), the Bureau of Internal Revenue accepted taxpayer's amendment to her informal claim and considered it on its merits and "finally rejected it on a ground abandoned in this action".

In the Petition for Certiorari, the United States does not urge that the Commissioner's letter of April 6, 1925 constituted a rejection of taxpayer's informal claim for refund. It reasserts the position, however, that the letter of March 23, 1925, if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

QUESTIONS PRESENTED

(1) Whether taxpayer's letter dated March 23, 1925 constituted a timely informal claim for refund.

(2) Whether said informal claim was duly amended on September 24, 1928.

(3) Whether taxpayer's claim for refund for income taxes overpaid to Collector Grogan was merged or extinguished by a judgment against Collector Woodworth; whether in any event this point was abandoned in the Circuit Court of Appeals and can now be raised before this Court.

ARGUMENT IN OPPOSITION TO THE WRIT

The Government relies on the following reasons for granting the Writ: (1) That a review is of great importance in the administration of the revenue laws; (2) That the decision below departed from the usual course of judicial proceedings; (3) That it is in conflict with the decision of another Circuit Court of Appeals; (4) That the prior judgment against Collector Woodworth forecloses taxpayer from maintaining the present suit.

(1) A review of the decision below is not of great importance in the administration of the revenue laws.

The case at bar involves many technical questions peculiarly applicable to the tax year 1919. Due to the many changes in the statutes and regulations since that time, it is extremely doubtful whether a review would be of more than historical interest. It would not have any bearing on the administration of the present revenue laws even if a case involving a comparable fact situation should ever arise again.

It would, of course, be of some importance if the decision below would provide a potential means of prolonging tax litigation as argued on page 8 of the Peti-

tion or if its effect would permit taxpayers to suspend the statute of limitations operating against claims for refund as argued on pages 13 and 14 of the Petition. We submit, however, that such consequences will not follow in the event this case is not reviewed.

Since 1919, the law has been amended so that final closing agreements fixing the March 1, 1913 value of property in advance can now be entered into between the Commissioner and taxpayer. Such agreements are binding on both sides in the absence of fraud, malfeasance or misrepresentation of a material fact. *Section 3760 Internal Revenue Code;* T. D. 4855, C.B. 1938-2 p. 52 (Appendix infra page 20). Litigation like the case at bar can be absolutely prevented, if the Commissioner refuses to give declaratory rulings without a closing agreement.

The possibility of using informal claims as a means of preventing the running of the statute of limitations ended in 1929 upon the promulgation of T. D. 4266 C.B. VIII-1, page 111 (Appendix infra page 21) providing that no refund or credit would be allowed after the expiration of the statute of limitations "*computed without regard to the filing of any so-called informal or defective claim*". An exception was made in the event timely informal claims were perfected prior to May 1, 1929. The case at bar comes within this exception, but since it is manifestly now impossible for other taxpayers to comply with these conditions, the decision in the case at bar will not constitute a precedent having any general application whatsoever.

Nor can the statute of limitations be extended by filing contingent formal claims, since the Commissioner has the remedy in his own hands of promptly disallowing the

claim. See *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 71. The present controversy was unduly prolonged by the Commissioner's failure to take action on taxpayer's claim and a review is not necessary to afford a solution to this phase of the administration of the tax law.

(2) The decision below did not depart from the usual course of judicial proceedings.

The issues in the case at bar are separate and distinct from those in *Woodworth v. Kales*, 26 F. (2d) 178. The former case did not relate solely to the computation of the profit on the sale of taxpayer's Ford Motor Company stock as suggested on page 7 of the Petition. That case went off on a directed verdict involving the question of the validity of the 1925 jeopardy assessment. If testimony had been taken, taxpayer could have recovered the $2,627,309.05 overpaid to Collector Woodworth by establishing that the March 1, 1913 value of the stock was not less than $9,489.34 per share. It would not have been necessary to establish a higher value. The case at bar involves an overpayment to Collector Grogan, and on a trial on the merits taxpayer would recover upon proof that the March 1, 1913 value exceeded $9,489.34 per share. Petitioner admits (Petition 15) that taxpayer could not have sued Collector Woodworth for overpayments made to Collector Grogan.

The Government argues (Petition 8) that there was no timely claim for refund in the case at bar and considerable space is devoted (Petition 9-12) in an attempt to show that taxpayer's letter of March 23, 1925 was merely a protest.

We submit that the court below did not depart from the usual course of judicial proceedings in holding that this letter constituted an informal claim for refund (R. 65). It is admitted that the time for filing claims did not expire until April 14, 1925 (Petition 8) so that the letter, if a claim, was timely filed. No claim is made that it was rejected or that suit was not brought within the time provided in Section 3226, R.S.

It is argued (Petition 8) that no claim was filed prior to April 14, 1925 on Treasury Form 843 as required by Art. 1306, Reg. 65. However, ever since 1873 it has been held that applications to the Commissioner of Internal Revenue, even though fatally informal, are sufficient at least to be the foundation for an amendment so as to defeat a plea of limitation. 14 *Opinions Attorney General* 615. In 1924, the Solicitor held that an unsworn letter, not on the required form, was subject to being perfected after the statute of limitations had run. *L.O.* 1116, *C.B.* III-1, p. 350, 359. *T.D.* 4265 *C.B.* VIII-1, p. 116, promulgated in 1929, expressly provided that a refund claim would not be considered defective solely because it was not on Form 843.

It seems clear, therefore, that the sufficiency of taxpayer's letter as constituting a claim is not governed by the fact that it was not on Form 843. The Government does not argue that if it was a claim, that it was improperly amended on September 24, 1928 under the rules laid down in cases such as *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62; *United States v. Factors & Finance Co.*, 288 U.S. 89; *Bemis Bro. Bag Co. v. United States*, 289 U.S. 28. These cases hold that claims, not conforming to the Regulations, may be amended after the statute of limitations has run at any time

before the original claim has been finally rejected. The Petition for Certiorari distinctly negatives the idea that taxpayer's original claim was rejected.

If the letter of March 23, 1925, particularly paragraphs 9 and 10 thereof, is read in the light of the surrounding circumstances, including the practical construction placed upon the letter by the Bureau of Internal Revenue for over ten years, we submit that it can not be said, as suggested on page 9 of the Petition, that there was an utter lack of any foundation for treating it as a claim.

That there is no basis for the Government's contention in this respect, is clear from the fact that the Commissioner who received the letter always treated it as a claim (See Par. 3 (n) of the Amended Petition, R. 17); that the General Counsel heard it on the merits and ruled that it was sufficient as an informal claim (R. 42, 43); that a refund was recommended (R. 43); and that the matter was disposed of by the Commissioner years later on other grounds (R. 34, 57). In fact, it is not even asserted in the Petition for Certiorari that the Commissioner did not understand the letter in question to be a claim for refund, or that he was in any way misled.

The argument on page 11 of the Petition, that the letter was merely a letter of protest and that paragraphs 9 and 10 thereof constituted at most a mere declaration of intention to make a claim at some later time (Petition 12), fails to take into consideration two practical points: (1) That taxpayer would have no reason in 1925 for protesting to Collector Woodworth against a payment made five years before to Collector Grogan, and (2) That since the statute of limitations was about to expire, it would have been futile to wait until some future time to file a claim for refund.

Paragraphs 9 and 10 of the letter clearly advised the Commissioner of the grounds upon which the claim for refund was based and no claim is made that he was misled or deceived by the language used or the failure to file a formal claim at that time. It is settled that the Commissioner may waive literal compliance with the Regulations—*Tucker v. Alexander*, 275 U.S. 228, 231; that even a transmittal letter accompanying a waiver is the equivalent of a notice of a claim if the Commissioner has so treated it—*Bonwit Teller & Co. v. United States*, 283 U.S. 258; that in determining the application of a statute of limitations the word "claim" should be interpreted with reasonable liberality. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, (note #2).

The fact that paragraphs 9 and 10 were couched in the future tense is grammatical rather than substantive. It was held in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 198, that a telegram reading in part "*We will make claim* against railroad for entire contents of car at invoice price" constituted a present claim. In *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 384, it was held that a claim reading in part (see 61 F. (2d) 605) "*If* the audit now being made reflects a different result *it will be* submitted as additional evidence", was subject to amendment.

The court below said that taxpayer's statement was in the nature of a counterclaim and that the claim did not mature until the March 1, 1913 value of the stock was changed (R. 65). The decision, relying on the analogy to the rules regarding alternative pleadings, concluded that the letter constituted an informal claim. Part of Petitioner's motion to dismiss (R. 38) is conditional and in the alternative, but the meaning is clear enough nevertheless.

We submit therefore that the decision below comes within the rules laid down by this court and did not depart from the usual course of judicial proceedings.

(3) The decision below is not in conflict with the decisions of another Circuit Court of Appeals.

It is argued (Petition 12) that the decision below is in conflict in principle with *Art Metal Const. Co. v. United States*, 47 F. (2d) 558 (C.C.A. 2nd). There was no similarity between the claim for refund in that case and the one in the case at bar. The decision is also distinguishable by the following part of the court's opinion (page 560), which the Government did not quote in its Petition:

> "*We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that taxpayer had come to doubt the validity of any part of the tax.* In such cases we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others."

The letter in the case at bar certainly advised the Commissioner that taxpayer had come to doubt the validity of part of the tax paid to Collector Grogan.

Ordway v. United States, 37 F. (2d) 19 (C.C.A. 2nd), is also distinguishable. The letter in that case was written at a time when no claim in fact existed. The court held on page 21, that if the only difficulty with it had been lack of proper form "*or if any claim had at that time arisen, we might overlook all defects*". In the case at bar, the letter of March 23, 1925 was filed long after

the overpayment occurred. In *Philipsborn v. United States*, 53 F. (2d) 133 (Ct. Claims), it was pointed out, page 133, that the letter there involved "makes no mention of a claim for refund and uses no language which can be construed as making such claim". *Baltimore & Ohio R.R. v. United States*, 260 U.S. 565, merely held that a preliminary request for an informal ruling before affixing stamps to certain deeds did not constitute a claim for abatement or refund.

Payment is a condition precedent to making a claim for refund. *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141. No claim for refund can be made *until after* the taxes have been paid. See *Kings County Savings Institution v. Blair*, 116 U.S. 200, 205, where a protest endorsed on the checks by which the taxes were paid, was held to be ineffectual.

Waters v. United States, 12 F. Supp. 658, is hence distinguishable. The taxes there involved were not paid before the letter under consideration was filed. The District Court's opinion indicates that payment was transmitted simultaneously with the letter but the Record itself shows that payment was in fact made after the date of the letter, which fact was mentioned in the opinion below (R. 66). The *Waters* case is distinguishable on other grounds as well. For example, there was no evidence that either the taxpayer or the Commissioner regarded the letter as other than a statement of intention to file a claim. No grounds for refund were stated, and no copy of the letter was filed with the Commissioner as in the case at bar.

Hence, we submit the decision in the case at bar is not in conflict with any other decisions.

(4) The prior judgment against Collector Woodworth does not foreclose taxpayer from maintaining the present suit.

It is argued briefly on page 11 of the Petition, that the claim of March 23, 1925 ceased to have any vitality after the decision in 26 F. (2d) 178.

Again on page 14, it is claimed that the former judgment forecloses Respondent from maintaining the present suit.

Both of these contentions were decided against the Government in *Sage v. United States*, 250 U.S. 33. In that case, taxpayer filed a claim for refund, and thereafter made a partial recovery against the Collector to whom the tax was paid. Subsequently and without filing a new claim, suit was brought in the Court of Claims for the residue. The Solicitor General argued, page 34, that the claim was merged into, and extinguished by, the prior judgment. The Court of Claims dismissed the suit on demurrer. This Court however, reversed, holding that the former judgment was not a bar.

If one claim will support two suits, then it would seem that two claims for overpayments made to two different Collectors would support two suits against two different defendants.

The liability of each Collector was personal. Woodworth could not have been sued for payments made to Grogan, his predecessor. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *Union Trust Co. v. Wardell*, 258 U.S. 537; *Levy v. Wardell*, 258 U.S. 542. See also *Graham and Foster v. Goodcell*, 282 U.S. 409, 430; *Tait v. Western Md. Land Ry. Co.*, 289 U.S. 620, 627.

Petitioner argues on page 14, that the maintenance of the case at bar permits taxpayer to split a cause of action. This is in effect a plea of res adjudicata. *Western Maryland Ry. Co. v. United States*, 23 F. Supp. 554, 555. However, this conclusion is contrary to the cases cited in the preceding paragraph, that the liability of each Collector is several. Furthermore, in addition to having a defendant different than the one in the prior suit, the present issues are different. See page 10, *supra*.

It is intimated on page 15 of the Petition, that taxpayer is attempting to contest the same taxes by successive suits in the same forum, and that Congress could never have intended to permit this. Taxpayer is not, however, litigating over the same tax payments that were involved in the prior suit, and so long as the Commissioner himself is permitted to make successive assessments on taxes for the same year, there is a possibility of successive suits. Litigation over one assessment might be concluded before the Commissioner made another assessment, and it would seem to be absurd to conclude that Congress intended that taxpayers in such a situation would be deemed to have exhausted their legal remedies by their first suit.

No authority is cited for the proposition urged on page 15 that a suit against Collector Woodworth is res adjudicata as to issues that admittedly could not have been litigated in that case, merely because taxpayer might have brought suit in the Court of Claims. The right to sue Collectors in the District Court is a valuable right to taxpayers, since they can obtain a Jury Trial in the district within which they reside. No reason occurs to us why taxpayers should be forced to sue at their

peril in the Court of Claims. Taxpayer's brothers' estates are a good illustration of the necessity of successive suits to do justice. In their 1919 income tax cases before the Board of Tax Appeals it was determined that they had likewise made overpayments based upon a $10,000 March 1, 1913 value of the Ford Motor Company stock which they had sold. The Commissioner refused to make refund and it was necessary to reduce the claim to judgment in the Court of Claims to get their money back. *Goodenough v. United States*, 19 F. Supp. 254. If Petitioner's theory was adopted, the proceedings in the Board of Tax Appeals would have barred their recovery in the Court of Claims.

The District Court's decision in *Western Maryland Ry. Co. v. United States*, *supra*, also cited on page 15 of the Petition, is not in point. This case merely holds that a tax and resulting interest are to be treated as constituting a single liability, and hence there can not be a recovery of the tax in a suit against the Collector and a recovery of the interest in a suit against the United States. The tax and interest could have both been recovered in the former suit. The suit at bar is distinguishable, since it is freely admitted that the tax here involved could not have been recovered in the prior suit.

There is no substance to the argument on page 15, that liability for a single tax year can be kept in suspense by a series of suits which could be expanded indefinitely by ingenuity of counsel. If the Commissioner saw fit to make successive assessments and the taxes were paid to different Collectors, more than one suit for the same tax year might be possible. Obviously, this result could not be controlled by the taxpayer's counsel.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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April 7, 1941.

APPENDIX

Internal Revenue Code

SEC. 3760. CLOSING AGREEMENTS.

(a) AUTHORIZATION. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) FINALITY. If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

T.D. 4855 C.B. 1938-2, p. 252 (promulgated August 18, 1938).

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ARTICLE 1. CLOSING AGREEMENTS RELATING TO TAX LIABILITY IN RESPECT OF INTERNAL REVENUE TAXES.—Closing agree-

ments provided for in section 606 of the Revenue Act of 1928, as amended, may relate to any taxable period ending prior or subsequent to the date of the agreement. * * * With respect to taxable periods ending subsequent to the date of the agreement, the matter agreed upon may relate only to one or more separate items affecting the tax liability of the taxpayer. The following, among others, are examples of the latter type of closing agreement: (1) A taxpayer may sell a portion of his holdings in a particular stock. A closing agreement may be entered into fixing the cost or other legal factor determining the basis for computing gain or loss on such sale, and, at the same time fixing the cost or other legal factor determining the basis (unless or until the statute is changed to require the use of some other factor to determine basis) of the remaining portion of the stock still held by the taxpayer upon which gain or loss will be computed when the taxpayer sells such stock in a later year; (2) *if the taxpayer is undecided whether to sell property or hold it, or as to the price at which to sell it, a closing agreement may be entered into determining the market value of the property as of March* 1, 1913, *for future taxable periods, prior to the consummation of the sale by the taxpayer.* * * * (Italics added.)

T.D. 4266 C.B. VIII-1, p. 111 (promulgated March 27, 1929).

To All Collectors of Internal Revenue and Others Concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (*computed without regard to the filing of any so-called informal or defective claim*) unless prior to the expiration of such period a formal

claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for any purpose as a claim for refund or credit. (See e.g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1396, Reg. 65; art. 1304, Reg. 69; art. 1254, Reg. 74; Law Opinion 1116 (C.B. III-1, 350); T.D. 4265 (page 110, this Bulletin).) (Italics added.)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.